In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,

Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Respondents.

Reply Brief of Petitioner

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Respondents' Brief in Opposition ("Res. Br.") starts by saying the case is moot, which it clearly is not, and goes on to avoid the issues the case presents. To the extent it is relevant to those issues at all, it proves this Court should review them.

I.

THE PETITION IS NOT MOOT

Respondents say that the injunction only remained in effect "pending a decision by arbitration;" that the arbitra-

tor has now decided the underlying dispute in favor of Petitioners; that the injunction has therefore "ceased to exist, by its own terms;" and, accordingly, that "the matter is moot." (Res. Br., 12-13)

The difficulty is that Respondents posted a bond when they obtained the preliminary injunction. The bond is conditioned upon the injunction's having been "wrongfully" issued. If this Court holds that the injunction was wrongfully issued, Respondents are liable upon the bond.* Therefore the question whether the injunction was wrongfully issued is not moot, and neither is this case. *Liner v. Jafco, Inc.*, 375 U.S. 301, 305 (1964) (injunction restrained picketing on construction site; construction completed pending appeal; appeal not moot since petitioners "plainly have 'a substantial stake in the judgment' [citation omitted], . . . [which] derives from the undertaking . . . in the injunction bond to indemnify them in damages if the injunction was 'wrongfully' sued out.").

Moreover, even apart from the bond, "this is particularly a case in which . . . '[this Court] should be astute to avoid hindrances'" to its review of the questions the Petition presents. That is so because this Court's "superintendence" of the District Courts' issuance of preliminary injunctions in arbitral labor disputes is "desirable" and the questions the case presents are "fundamental." *See Liner v. Jafco, Inc.*, above, 375 U.S. at 306.

*Petitioners also contend that Respondents should be liable upon that bond because the arbitrator ruled against Respondents. (Part IID, below) If this Court should so hold, once again Respondents will be liable upon the bond.

II.

THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE QUESTIONS PRESENTED

A. The Jurisdiction of The Arbitrator.

The Petition asks this Court to determine whether a District Court may restrain an employer from taking action pending arbitration where the employer is willing to arbitrate the dispute and the injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute. (Petition, pp. 2-3, 11-17)

Petitioners said the answer to that question was no, because the applicable principle is that a District Court cannot issue such an injunction except when necessary "to preserve the jurisdiction of the arbitrator," and then only when that remedy is the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile." (Petition, p. 15)

Respondents now seem to agree that that is the rule. (See Res. Br., 14-15, 21)* That concession, however, should not obscure the real issue which is that the courts below did not follow that rule. The District Court did not and could not find that the injunction it issued was necessary to preserve the arbitrator's jurisdiction or to ensure that the exercise of that jurisdiction was not futile. Neither did the Ninth Circuit. Instead, the Ninth Circuit held that the *Steelworkers Trilogy*** requires the courts to lower the

*Respondents say relief may be granted where "necessary" and to prevent "injury so irreparable that a decision by the Board in the Union's favor would be but an empty victory." (Res. Br., 14-15) Then they say that rule justified this injunction. (Res. Br., 21)

***United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

barriers to the granting of injunctive relief in arbitral labor disputes. (Petition, pp. 11, 21-22)

This Court has never squarely ruled on the issue as to whether and under what circumstances *Boys Markets*• permits a District Court to issue an injunction restraining action pending arbitration. Respondents apparently agree. (Res. Br., pp. 14-18) The Ninth Circuit decision stands as the only Court of Appeals decision affirming a District Court injunction restraining an employer from acting pending arbitration. Respondents agree again. (Res. Br., p. 19, n. 4) The Ninth Circuit decision is based upon the wrong rule. Now Respondents apparently agree to that too. (p. 3, above) But the decision stands, and lower courts will follow it if it is not reversed. This Court should review it and reverse it.

B. The Addition of New Terms to the Agreement.

The Petition asks this Court to determine whether a District Court may add onto a collective bargaining agreement the term that an employer shall preserve the status quo pending arbitration, and then enforce the term by issuing a preliminary injunction. (Petition, pp. 3, 17-19)

The Ninth Circuit in effect did that, and therefore its decision is contrary to the decision in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). (Petition, pp. 3, 18-19) The decision is also wrong, because it is for the arbitrator, not the Court, to decide whether a collective bargaining agreement contains such a provision and, if so, how to enforce it. (Petition, pp. 17-19)

Respondents' first answer is that *Detroit News* does not conflict with the Ninth Circuit's decision here. (Res. Br.,

•*Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

pp. 21-22, n. 7) But it does. *Detroit News* ruled that a District Court cannot construe a "status quo" clause in a contract, much less add one to it, and cannot make a "factual determination as to whether there has been a violation" of the clause. *Id.*, 471 F.2d at 875. Here the District Court in effect added such a clause to the agreement, and then went on to enforce it.

Next, Respondents argue that "the logical corollary to the *Boys Markets* decision is that federal courts may also issue injunctions against employers to preserve the status quo pending arbitration," apparently without regard to whether the employer promised to maintain the status quo pending arbitration. (Res. Br., p. 17) The Ninth Circuit said it rejected that premise (Opinion, Petition, App. B, pp. 20-21), but its decision in effect adopted it.• That premise is false. *Boys Markets* holds that a no strike clause is the quid pro quo for the employer's promise to arbitrate, not for an employer's promise not to act pending arbitration; indeed, *Boys Markets* stands for the proposition that an employer who has agreed to arbitrate a dispute has done all he promised to do, and therefore has done no wrong to enjoin.

The Ninth Circuit decision misapplies *Boys Markets* and makes Respondents' false premise the law. Therefore, and because the decision conflicts with *Detroit News,* this Court should review the Ninth Circuit's decision and reverse it.

•Other language in the Opinion seems to show that the Ninth Circuit proceeded upon the premise which it said it was rejecting.

> "We hold that a plaintiff, without regard to whether he is the employer or the union, seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market*, need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (Opinion, Petition, App., B, p. 18)

C. The Nonshowing of Likelihood of Success on the Merits.

The Petition asks this Court to determine whether a District Court may enjoin an employer from acting pending arbitration without finding that the union has a likelihood of success on the merits before the arbitrator. The Second Circuit answered that question no. *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit answered it yes here. (Petition, p. 3)

Respondents say, first, that the Ninth Circuit decision does not really conflict with *Hoh* because *Hoh* simply requires that there be 'some likelihood of success' in the sense that the underlying claim . . . is not 'plainly without merit.'" (Res. Br., p. 27) The Ninth Circuit speculated that perhaps that is indeed what *Hoh* meant. (Opinion, Petition, App. B, p. 18)

That is not, however, what *Hoh* held or said. *Hoh* held that a union must show some likelihood of success on the merits; *Hoh* expressly says that "*at least* this much is required . . . ." (491 F.2d at 561; emphasis added) *Hoh* does not hold that a union must merely prove its claim to be not "plainly without merit." *Hoh* says it "would be inequitable in the last degree to grant an injunction" where a claim is plainly without merit, and shows by example of that last degree what absurd and inequitable results would follow were a union not required to show likelihood of success on the merits. This is the whole passage from which Respondents and the Ninth Circuit take the "plainly without merit" phrase (Res. Br., pp. 26-27); it speaks for itself and, we believe, proves the point:

> "Furthermore, the 'ordinary principles of equity' referred to as a guide in the portion of the *Sinclair* dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although Courts have been directed by the *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.
>
> "We see little reason to think the unions here have met the requirement of showing some likelihood of ultimate success." 491 F.2d at 561.

The Ninth Circuit decision therefore conflicts with *Hoh*, and this Court should review the Ninth Circuit decision to resolve the conflict.

Respondents argue, however, that the rule is clear, and the rule is that there can be no inquiry into the merits. (Res. Br., pp. 23-27) But their brief discloses their error. It says their "contention" before the District Court was that Petitioner's "action would violate the collective bargaining agreement . . .", and that had "the proposed changes been implemented prior to arbitration, irreparable harm would have resulted." (Res. Br., p. 20) But if their "contention" were wrong on the merits, as the arbitrator ultimately found it to be, then Petitioner's putting the changes into effect pending arbitration could not have irreparably injured Respondents for the very good reason that one cannot be irreparably injured by being deprived

of a right he does not have. Accordingly, as a matter of logic a Court cannot find irreparable injury without finding on the merits, and Respondents' brief proves it.

The Ninth Circuit held that a union need only show irreparable injury to obtain an injunction restraining an employer from taking action pending arbitration. That is not the rule. (Part IIA, above) But if it is, that is all the more reason that the District Court must look to the merits before issuing such an injunction; again, one cannot be irreparably injured by being deprived of a right which, on the merits, he does not have.

This Court should review the Ninth Circuit decision in order to lay down rules with respect to when and to what extent a District Court must look to the merits before issuing an injunction restraining an employer from taking action which, on the merits, he may have a perfect right to take.

D. The Conditioning of the Bond.

The Petition asks this Court to determine whether a District Court can issue a preliminary injunction against an employer over an arbitral labor dispute without conditioning the bond to call for payment upon the union's losing before the arbitrator. The bond should be so conditioned because one who wins on the merits had a right to do what the preliminary injunction prevented him from doing; therefore he has been wrongfully restrained and should recover on the bond. That is the normal rule and it should be applied here. (Pet. 22-24).

Respondents reply that the normal rule is that one who wins on the merits does not win on the bond, citing 7 *Moore's Federal Practice* ¶ 65.09, page 65-94, and *Detroit Trust Co. v. Campbell River Timber Co.*, 98 F.2d 389 (9th Cir. 1938). Those authorities are beside the point. They

merely state that the amount of the bond should not cover payment for such damages as might ultimately be awarded on the merits of the case. They do not consider the circumstances under which a wrongful restraint has occurred.* That is the question which is presented by the Petition. It is answered by *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 144 (1949), which holds that one who wins on the merits has been wrongfully restrained and is entitled to recover on the bond for the injury that restraint caused. *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1102 (10th Cir.), *cert. denied*, 397 U.S. 1063 (1970) and *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 243 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), are in accord with *Arkadelphia*.

Here the arbitrator decided that the Company had the right under the Agreement to do what the preliminary injunction prevented it from doing. This Court should determine whether an employer in circumstances such as these is entitled to recover on the bond. It should do so not only because it has never before passed upon that question, but also because the decision below establishes a manifestly unfair rule. Indeed, even Respondents do not dispute that it is unfair, and cannot. He who wins on the merits ought not to lose on the bond.

**United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3rd Cir.), *cert. denied*, 408 U.S. 923 (1972) (Res. Br., p. 30) merely held that attorneys' fees should be covered by the bond. The language cited by Respondents is dictum. *Local 17 v. Ringsby Truck Lines*, 77 LRRM 2928 (D. Col. 1971) doesn't even mention the proposition for which it is cited.

Similarly, Respondents are without authority for their argument that the conditioning of the bond is within the district court's discretion. (Res. Br., p. 30, n. 13) The cases cited involve the *amount* of a bond, not the conditions on which it is payable.

CONCLUSION

The Petition should be granted as to all four questions presented.

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